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In The

Supreme Court of the United States

CARL W. CLEVELAND,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether, prior to its issuance, a standard business license – one without a profit-sharing arrangement between the government and the licensee – is the government's property?

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INTEREST OF AMICUS CURIAE

Amicus curiae, the Chamber of Commerce of the United States of America ("the Chamber"), is the world's largest business federation.[1] The Chamber has a substantial membership in each of the 50 States, and through its federation of members represents more than 3,000,000 businesses and professional organizations of every size and in every sector of the economy. More than 95% of the Chamber's members are small businesses with 100 or fewer employees, and virtually all of the nation's largest companies are also members of the Chamber. The Chamber thus serves as a principal voice of American business.

Among its activities, the Chamber represents the interests of its members in matters that are before the various branches of government, including the judiciary. The Chamber has thus participated as *amicus curiae* in numerous cases before this Court, including cases such as *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), that raised questions addressing government regulation or government remedies for alleged fraud.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of the Court.

In this case, the United States Court of Appeals for the Fifth Circuit upheld convictions for, among other things, federal mail fraud. The convictions arose out of alleged misrepresentations by Petitioner and others in an application for (and renewals of) a Louisiana state video poker machine operator's license. Cert. Pet. at 2-7; Opp. at 2-5. The Chamber takes no position on the merits of this specific case. However, given the central role that standard business licenses play in the ongoing commercial activities of its members, and the breathtaking expansion of criminal and civil liability that would result from an overly broad decision here, the Chamber is vitally interested in assisting the Court to reach an informed and appropriate resolution of the question addressed in this brief.

INTRODUCTION

The Chamber's members and their employees together apply for hundreds of thousands of local, state, and federal licenses and permits every year. These standard business licenses, without the benefit of which the Chamber's members cannot lawfully carry on many of their commercial activities, pertain to matters as varied as commodity-specific sales and service permits (*e.g.*, selling or serving food), vehicle operator's licenses, construction or other realty development permits, and professional licenses for fields such as accounting, architecture, engineering, insurance brokerage, investment advice, law, medicine, plumbing, securities brokerage, and taxi driving, among others. See, *e.g.*, D.C. Code Ann., tit. 47, ch. 28

(1997 & Supp. 2000) (establishing comprehensive "General License Law" for the District of Columbia). It is thus no exaggeration to say that the standard business license – of which the foregoing are but a few examples – touches virtually every aspect of contemporary American commercial life. Such standard business licenses typically have application fees that are set roughly to approximate the cost of administering the licensing regime, and such licenses usually do not initiate an ongoing profit-sharing relationship with the licensing authority. At least in the lower federal courts, the Government has consistently argued – with only limited success – for an interpretation of what constitutes government property that would reach unissued standard business licenses. See, *e.g.*, *United States* v. *Martinez*, 905 F.2d 709 (3rd Cir. 1990) (unissued medical license held to be government property).[2]

The federal mail fraud conviction at issue in this case stems from Petitioner's application for a Louisiana video poker machine operator's license, as well as renewals of that license. Cert. Pet. at 2-7; Opp. at 2-5. Louisiana's state video poker machine operator's licensing system has some features that the Government argued in its Certiorari Opposition distinguish video poker licenses from

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[2] The Government has made the same argument in other cases without success. *See, e.g., United States* v. *Paccione*, 949 F.2d 1183 (2d Cir. 1991) (waste transporter permit); *Toulabi* v. *United States*, 875 F.2d 122 (7th Cir. 1989) (taxi driver's license); *United States* v. *Granberry*, 908 F.2d 278 (8th Cir. 1990) (school bus operator's license); *United States* v. *Kato*, 878 F.2d 267 (9th Cir. 1989) (pilot's license); *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998) (bail bond license).

the many standard licenses for which businesses and professionals routinely apply. Specifically, "the [Louisiana] Video Poker Act requires the licensees to pay a significant, up-front fee for their licenses and also to deposit 22.5% of their net revenues into the state treasury as a franchise fee." *United States* v. *Salvatore*, 110 F.3d 1131, 1141-42 (5th Cir. 1997) (affirming mail fraud convictions predicated on misrepresentations made to obtain Louisiana video poker operator's license); Opp. at 7-8. The Fifth Circuit has twice held – in the case at bar, and in its earlier decision in *Salvatore* – that an unissued video poker operator's license in the hands of the State is property for purposes of the federal mail fraud statute.

The narrow question before this Court is whether an as-yet unissued Louisiana state video poker machine operator's license constitutes the property of the State of Louisiana for purposes of the federal mail fraud statute, 18 U.S.C. § 1341 (1994). As was stated above, the Chamber takes no view on the merits of this specific question. The Chamber does urge, however, that the Court make clear that an unissued standard business license is *not* the issuing authority's property under the federal mail fraud statute. Alternatively, the Court should make clear that this case does not present – and therefore that the Court does not address – the more general question whether an unissued standard business license constitutes property for purposes of the federal mail fraud statute.

SUMMARY OF ARGUMENT

A standard business license is not property when it has not yet been issued by a licensing authority. When government – be it local, state, or federal – issues a license pursuant to an established administrative regime, it exercises the power to regulate, not the powers of a property owner. The regulatory nature of standard licensing regimes is plain, both as a matter of simple logic and under this Court's case law upholding a variety of state law licensing regimes as valid exercises of the States' respective police powers.

It is equally clear that, if an unissued standard business license were held to be an issuing authority's property for federal mail fraud purposes, a number of profoundly troubling results would follow. For example, this conclusion would seem to require fundamental reconsideration of this Court's regulatory takings jurisprudence. This is so because an issuing authority should be able set the price for an as-yet unissued realty development permit – which, under this hypothesis, is assumed to be the issuing authority's property – as high (or as low) as it likes, including requiring the surrender of a public easement across a private party's real estate. In addition, the conclusion that an unissued license is government property would spark an explosion of criminal and *civil* liability under federal and state RICO and *qui tam* statutes, at the same time upsetting whatever administrative enforcement mechanism the pertinent legislature may have crafted to respond to potentially falsified license applications. This Court should not lightly conclude that Congress, by criminalizing mail fraud, intended to undermine regulatory takings law or expand

powerful judicial remedies in derogation of license-specific administrative remedies.

ARGUMENT

The federal mail fraud statute is "limited in scope to the protection of property rights." *McNally* v. *United States*, 483 U.S. 350, 360 (1987).[3] To sustain a conviction for federal mail fraud, then, the Government must prove that the defendant defrauded another of something that qualifies as "property" under the statute. See, *e.g.*, *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987) (upholding federal mail and wire fraud convictions where "[t]he Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the 'Heard' column"). Indeed, as the Court observed in *McNally*, the mail fraud statute "had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests *as property holder*." *McNally*, 483 U.S. at 359 n.8 (emphasis added). Because a standard business license is

[3] The federal mail fraud statute provides, in relevant part, that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1341 (1994).

not the issuing authority's property before an applicant obtains it, a falsehood submitted to that licensing authority through the mails is not mail fraud.

I. AN UNISSUED STANDARD BUSINESS LICENSE IS NOT GOVERNMENT PROPERTY.

Local, state, and federal authorities have established myriad licensing and permitting regimes. These licensing and permitting regimes touch virtually every aspect of contemporary American commercial life, from the licensing of the professions (such as law and medicine) to setting conditions on the marketing of basic goods and services (such as selling and serving food). In order to obtain one of these standard business licenses, an applicant typically pays a fee that roughly approximates the proportionate cost of the regulatory program, and provides information demonstrating that he or she (or it) satisfies the government's criteria for obtaining the license.

For example, Chapter 28 of Title 47 of the District of Columbia Code sets forth a comprehensive "General License Law" for businesses operating in the District of Columbia. See D.C. Code Ann., tit. 47, ch. 28 (1997 & Supp. 2000). Under this General License Law, "[n]o person shall engage in or carry on any business in the District of Columbia without having first obtained a master business license and any necessary endorsements," which vary by the specific business at issue.[4] D.C. Code

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[4] "Business" is defined broadly under this scheme as "any trade, profession, or activity which provides, or holds itself out

Ann. § 47-2851.2 (Supp. 2000). The licensing system is administered by a Business License Center within the D.C. Department of Consumer & Regulatory Affairs. See D.C. Code Ann. §§ 47-2851.5, -2851.7 (Supp. 2000). The Business License Center "collect[s] a fee of $25 for each master business license it issues, plus $5 for each endorsement added to the master business license." D.C. Code Ann. § 47-2851.8(a)(1) (Supp. 2000). This fee is "deposited in the Master License Fund," D.C. Code Ann. § 47-2851.8(a)(2) (Supp. 2000), which Fund pays "[t]he entire cost of the master business licensing system," D.C. Code Ann. § 47-2851.13(b) (Supp. 2000).[5]

The licensing requirements vary according to the particular business at issue. "An applicant for licensure as a certified public accountant," for example, must "establish to the satisfaction of the Board of Accountancy that," among other things, she "[i]s of good moral character" and "[h]as passed a written examination in accounting and auditing and such related subjects as the Board shall

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to provide, goods or services to the general public or to any portion of the general public, for hire or compensation, and which pays, or is subject to the payment of, taxes on earnings, or fees in lieu of taxes, to the District of Columbia, or which qualifies for tax-exempt status under District law." D.C. Code Ann. § 47-2851.1(1)(A) (Supp. 2000). Moreover, the general requirement that all District businesses be licensed has only two narrow exceptions, one for businesses that are affiliated with a District-licensed business but maintain no business address in the District, and the other for specific businesses "whose annual gross receipts are $2,000 or less in any calendar year." D.C. Code Ann. § 47-2851.2(a)(1) & (2) (Supp. 2000).

[5] Renewal fees are treated in like manner. *See* D.C. Code Ann. §§ 47-2851.8(b), -2851.13(b) (Supp. 2000).

determine to be appropriate."[6] D.C. Code Ann. § 47-2853.42 (Supp. 2000). Importantly, all the District's licensing boards are expressly empowered to discipline a licensee who "[k]nowingly provides false or misleading information on or in support of an application or renewal application," as well as one who "[f]raudulently or deceptively obtains, or attempts to obtain, a license or certificate, or to register, for another person." D.C. Code Ann. § 47-2853.17(a)(1) & (2) (Supp. 2000). Possible penalties include revocation of the license, a "civil fine not to exceed $5,000 for each violation," and prosecution for criminal violations.[7] D.C. Code Ann. § 47-2853.17(c)(2) & (5), (d) (Supp. 2000).

As even this brief foray into District of Columbia business licensing makes clear, conducting a business in many localities entails applying for (and, from time to time, renewing) a standard business license of one kind or another. Under the Government's construction of the mail fraud statute, making a false statement on an application for such a license that is sent through the mails is

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[6] The Board of Accountancy is itself established by the General License Law. *See* D.C. Code Ann. § 47-2853.6(b) (Supp. 2000).

[7] Under the District's general criminal code, it is unlawful to "willfully make[ ] a false statement that is in fact material, in writing, directly or indirectly, to any instrumentality of the District of Columbia government, under circumstances in which the statement could reasonably be expected to be relied upon as true," so long as "the writing indicates that the making of a false statement is punishable by criminal penalties." D.C. Code Ann. § 22-2514(a) (1996 & Supp. 2000). This is analogous to the prohibition against making false statements to the Government of the United States set forth in 18 U.S.C. § 1001 (1994).

federal mail fraud because the unissued license is the issuing authority's property. Thus, for example, in *United States* v. *Martinez*, 905 F.2d 709 (3rd Cir. 1990), the Government successfully prosecuted as federal mail fraud a scheme for obtaining a Pennsylvania state *medical* license that included submitting fraudulent documents (*e.g.*, transcripts, a medical degree, etc.) through the mails. See *id.* at 710-11 (describing the scheme). This construction of the mail fraud statute is fundamentally flawed, however, because an unissued standard business license is not an issuing authority's "property" within the meaning of the statute – a conclusion compelled by the very nature of standard business licensing regimes and this Court's cases upholding such regimes as proper exercises of the police power.

1. To be sure, governments both own property and routinely exercise the power to dispose of that property. The United States, for example, once owned large tracts of land in what are now the Western States and, in order to promote the growth of the railroads, granted that land to railroad companies for them to develop. See, *e.g.*, *United States* v. *Northern Pacific Ry. Co.*, 256 U.S. 51, 52-53 (1921) (discussing one such set of grants to the Northern Pacific Railway Company). Similarly, the United States regularly disburses from the Treasury funds that it owns, sending the funds to designated recipients as diverse as taxpayers who are owed an income tax refund and government contractors who are owed for goods sold to the United States. State and local governments likewise own land and improvements (*e.g.*, school grounds and buildings) and hold and disburse general revenue funds. When governments engage in commercial or proprietary

activities, they exercise the powers of a property owner and are in many respects indistinguishable from other property owners.

Governments also exercise a different power that many other property owners lack – namely, the power to regulate conduct in the interests of public safety and welfare, or the "police power." "[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Chicago, Burlington & Quincy Ry. Co.* v. *Illinois ex rel. Grimwood*, 200 U.S. 561, 591 (1906). Indeed, "the police power is but another name for the power of government." *Mutual Loan Co.* v. *Martell*, 222 U.S. 225, 233 (1911).

When a government issues standard business licenses pursuant to its own licensing regime, it clearly exercises its police power, not the powers it has by virtue of owning property. This fact is evident when one considers that a licensing regime, no less than a correspondingly framed general prohibition, serves directly to limit and regulate private conduct. For example, a municipality could decide to regulate the provision of taxi services by making it a crime to drive a taxi without a specified level of knowledge about the streets in the municipality.[8] The regulation would be enforced by prosecuting taxi drivers who were stopped because they

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[8] A legislature could accomplish equally its regulatory goals through a general prohibition (*e.g.*, "you shall not practice accountancy without adequate skill") or through a licensing regime (*e.g.*, "you shall not practice accountancy without a license, which requires adequate skill"). No one would claim

appeared to be lost, or who were reported by passengers to lack the requisite knowledge. Alternatively, the municipality could decide to achieve the same regulatory objective (*i.e.*, limiting taxi drivers to those who are knowledgeable about local streets) by requiring would-be drivers to obtain a taxi driver's license that is conditioned on the successful completion of a local geography test. See *Toulabi* v. *United States*, 875 F.2d 122, 123 (7th Cir. 1989) ("To be a taxi driver in Chicago, a person must pay a fee of $50 and answer correctly 20 out of 25 questions on a test of local geography.").

In this hypothetical, the licensing method may be more effective at producing knowledgeable taxi drivers than the prohibition method. The crucial point here, however, is that in *both* methods the municipality acts as a regulator, not an owner disposing of his or her property. See *id.* at 125 (holding that an unissued taxi driver's license is not property for purposes of the federal mail fraud statute); see also *United States* v. *Schwartz*, 924 F.2d 410, 417 (2d Cir. 1991) ("The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interest in propounding and enforcing its other regulations with broad based applications

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that a general prohibition is a form of government property. *Cf.* Guido Calabresi, *The Cost of Accidents* 113-14 (1970) ("[P]rohibition and restriction . . . are really the same thing on different levels of generality. I speak of prohibiting an activity (banning the sale of firecrackers or all driving), or alternatively of restricting it (allowing firecrackers only in limited circumstances or barring driving at speeds of over 80 miles per hour). When we restrict an activity, we are simply prohibiting one of its subcategories.").

that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property.").

2. This Court has repeatedly held, in cases sustaining state and local licensing regimes against various constitutional attacks, that the creation of a licensing regime is an exercise of the police power. These cases thus confirm that the decision whether to issue a particular license to a given applicant is a regulatory and administrative act, not a disposition of property.

The earliest of these decisions, *Smith* v. *Alabama*, 124 U.S. 465 (1888), involved a Commerce Clause challenge to a then-new Alabama train engineer licensing law. The statute made it "unlawful for the engineer of any railroad train in [Alabama] to drive or operate or engineer any train of cars . . . without first undergoing an examination and obtaining a license." *Id.* at 468. Operating a train without a license was made a misdemeanor. *Id.* at 470. The license fee was $5. *Id.* at 469. Smith, an engineer arrested for operating a train without a license, *id.* at 466, attacked the statute as a violation of the Commerce Clause, *id.* at 473. This Court rejected Smith's theory, concluding that the licensing law was "within the scope of the admitted power reserved to the State to *regulate* the relative rights and duties of persons being and acting within its territorial jurisdiction." *Id.* at 482 (emphasis added).

Importantly, in turning aside Smith's challenge, the Court emphasized that the licensing law was the same

sort of state regulatory action as the Indiana state wrongful death statute it upheld against a Commerce Clause attack in *Sherlock* v. *Alling*, 93 U.S. 99, 103 (1876) (concluding that Indiana's wrongful death statute "only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured"). See *Smith*, 124 U.S. at 474-77 (analogizing licensing law to wrongful death statute at issue in *Sherlock*). According to the Court, "[t]he power to punish for the offence after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offence." *Id.* at 481. The licensing provisions were thus upheld as "parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them." *Id.* at 480.

A year later, in *Dent* v. *West Virginia*, 129 U.S. 114 (1889), the Court rejected a Due Process challenge to West Virginia's medical licensing law. The challenged statute "require[d] every practitioner of medicine in [West Virginia] to obtain a certificate from the State Board of Health" permitting him to practice. *Id.* at 115. Practicing medicine without this certificate was made a misdemeanor. *Id.* at 117. Dent, who was fined for practicing without a license, attacked the statute as a deprivation of "his vested right in relation to the practice of medicine" without due process. *Id.* at 118, 121-22. This Court upheld the constitutionality of the medical licensing law as a

routine and valid exercise of the police power. According to the Court in *Dent*,

> [t]he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the States as to their necessity.

Id. at 122; see also *Hawker* v. *New York*, 170 U.S. 189, 192-93 (1898) ("No precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practise medicine is a proper exercise of that power."). In *Dent*, as in *Smith*, the Court recognized that when a government issues a standard business license, it engages in a fundamentally regulatory act.

Finally, in *Gundling* v. *City of Chicago*, 177 U.S. 183 (1900), this Court upheld a conviction under a Chicago city ordinance "forbidding the sale of cigarettes by any person without a license." *Id.* Like the unlicensed doctor

in *Dent*, the unlicensed cigarette seller in *Gundling* challenged the ordinance as, among other things, an unconstitutional deprivation of his property rights without due process. *Id.* at 185-86. This Court upheld the licensing scheme for cigarette sales. According to the Court, "[w]hether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the state, and through it, for the city, to determine for itself." *Id.* at 187. Indeed, such a licensing scheme for regulating product sales was an unexceptional exercise of the police power:

> Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state. . . .

Id. at 188; see also *id.* at 189 (licensing cigarette sales served a "regulating . . . function").

The governmental business licensing requirements that were already "very frequent" a century ago are, today, virtually universal. And, just as they were a century ago, governmental decisions whether to issue a standard business license to a given applicant are regulatory acts, not dispositions of government property.

II. TREATING UNISSUED STANDARD BUSINESS LICENSES AS PROPERTY UNDER THE MAIL FRAUD STATUTE WOULD BRING ABOUT TROUBLING RESULTS IN OTHER AREAS OF LAW.

The question whether the United States can prosecute for federal mail fraud one who sends a falsehood through the mail to obtain a standard business license (be it local, state, or federal) might initially be viewed strictly as a matter affecting federal criminal law. But the effects of answering that question affirmatively – *i.e.*, by ruling that unissued licenses are government property – could extend far beyond the confines of the criminal law. Three illustrations drawn from diverse areas of law – one involving this Court's Takings Clause jurisprudence, the others involving powerful civil remedies – will suffice to demonstrate the havoc that could well result from concluding that unissued licenses are the government's property.

1. Treating an as-yet-unissued license as if it were the issuing authority's property would draw key features of this Court's regulatory takings jurisprudence into serious doubt. To see that this is so, one need only consider the Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), from the state permitting authority's new vantage as the property owner of the unissued real estate development permit.

In both *Nollan* and *Dolan*, the government authority that was charged with issuing the relevant real estate development permit had decided to condition the grant

of the permit on the would-be permittee's agreement to an easement. See *Nollan*, 483 U.S. at 828 (permit would be granted "subject to the condition that they allow the public an easement to pass across a portion of their property"); *Dolan*, 512 U.S. at 380 ("the Commission required that petitioner dedicate . . . an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway"). In both cases, this Court concluded that the government, by extracting these easements, had taken the permittee's property. See *Nollan*, 483 U.S. at 841-42; *Dolan*, 512 U.S. at 396. This conclusion cannot be squared, however, with the Government's current position that unissued permits and licenses are government property.

According to the Government's approach, the unissued permits at issue in *Nollan* and *Dolan* would be the property of the governmental authorities that had the power to issue them. If unissued permits or licenses are the government's property, however, it should be able to charge the would-be permittees whatever price it deems fit under the circumstances – including the price of granting the general public an easement over private realty. Indeed, the power to name one's selling price – any selling price at all – is the very essence of a *property* interest: "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon *by the seller*." Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972) (emphasis added). In more traditional

parlance, the power to set one's selling price is one aspect of the owner's right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Under the Government's reasoning in this case, the permitting authorities in *Nollan* and *Dolan* did not *take* anything; rather, they simply priced the unissued permits that they owned at a level which included the surrender of a public easement.

In short, the Government's approach means that *Nollan* and *Dolan* were wrongly decided. Indeed, if one adopts the Government's conclusion that an unissued permit or license is the issuing authority's property, the government's refusal to issue a permit or license would always be an exercise of its right to refuse to transfer ownership of its own property and thus could never be a taking.

2. Treating an as-yet unissued license as if it were the issuing authority's property would also nullify existing locally-crafted, specifically-limited remedies (such as those discussed in connection with the District of Columbia's General License Law, *supra* at 7-8), in favor of not only much harsher federal criminal penalties,[9] but also in

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[9] This Court has, of course, "cautioned . . . that 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones* v. *United States*, 68 U.S.L.W. 4422, 4425 (U.S. May 22, 2000) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)), *see also id.* (Stevens & Thomas, JJ., concurring) (same). The mail fraud statute contains no such clear statement of purpose to up-end the existing federal-state balance regarding local prosecution for violations of local standard business licensing regimes.

favor of broad federal and state civil anti-racketeering and *qui tam* remedies designed for problems far removed from arguable misstatements in applications for standard business licenses. Congress surely did not intend to expose business license applicants to these types of civil lawsuits.

Consider, first, RICO. The federal RICO statutes criminalize, among other things, engaging in "a pattern of racketeering activity." 18 U.S.C. § 1962(c) (1994). The RICO regime also provides private parties a cause of action against racketeers: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit." 18 U.S.C. § 1964(c) (1994). A " 'pattern of racketeering activity' requires at least two acts of racketeering activity," and an act of federal mail fraud is within the definition of "racketeering activity." 18 U.S.C. § 1961(1) & (5) (1994). As a result, a party who is injured in his business or property by another party's two acts of mail fraud could seek to sue in federal court for treble damages. Assuming, for example, that obtaining two renewals of a standard business license by submitting false information through the mails constitutes federal mail fraud, that licensee is thus also liable under federal RICO to those he injures in their business or property. Many states have their own parallel RICO laws.

The foregoing scenario is not mere sport. In *Semiconductor Energy Laboratory Co.* v. *Samsung Electronics Co.*, 204 F.3d 1368 (Fed. Cir. 2000), decided just three months ago, the United States Court of Appeals for the Federal Circuit

confronted just such a claim for RICO liability. In *Samsung*, the accused infringer successfully defended against patent infringement liability by proving that the patent was unenforceable due to the patentee's inequitable conduct before the United States Patent & Trademark Office ("PTO") during the patent prosecution process. *Id.* at 1373-78 (affirming district court's conclusion that patent was unenforceable due to inequitable conduct). The accused infringer had also, however, brought counterclaims under the federal and state RICO statutes. *Id.* at 1378. The accused infringer's theory of RICO liability was that the patentee had committed two or more acts of mail fraud, and thus racketeering activity, by submitting false information *to the PTO* through the mails. *Id.* at 1379. The unissued patent was, according to the accused infringer, property for purposes of the mail fraud statute. *Id.* at 1380. The Federal Circuit rejected the federal and state RICO claims, concluding "that inequitable conduct before the PTO cannot qualify as an act of mail fraud or wire fraud for purposes of the predicate act requirement." *Id.* Central to this conclusion was the Federal Circuit's rejection of the notion that an unissued patent is property:

> [T]he PTO has not been defrauded of property. Although that 'a patent is property, protected against appropriation both by individuals and by government, has long been settled,' an application that has not yet matured into a patent cannot properly be deemed government property.

Id. (quoting *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 415 (1945)). Of course, under the Government's theory of the mail fraud statute in this case, *Samsung* was

apparently wrongly decided, and RICO liability for inequitable conduct before the PTO should obtain.

Consider, as well, *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729-3733 (1994), and state analogs thereof.[10] In a *qui tam* suit, a private party brings an action on behalf of the government to redress an injury to the government, *e.g.*, a fraudulent claim for government property. See generally John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 1.01[A], 1-6 – 1-11 (2d ed. 2000) (reviewing early history of federal *qui tam* statute). Specifically, under the False Claims Act, one who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim" is "liable to the United States Government for a civil penalty," as well as "3 times the amount of damages which the Government sustains because of the" false claim.[11] 31 U.S.C. § 3729(a) (1994). A "claim" is defined broadly under this statute as "includ[ing] any request or demand, whether under a contract or otherwise, for money or *property*," so long as "the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (1994).

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[10] A number of States have False Claims Act-like statutes that create *qui tam* causes of action. *See, e.g.*, John T. Boese, *Civil False Claims and* Qui Tam *Actions* § 6.01[A], [B] & [D], at 6-4 – 6-14, 6-25 – 6-26 (2d ed. 2000) (reviewing details of California, Florida, and Illinois analogs to the False Claims Act).

[11] In addition to seeking penalties (and damages, if they exist), a clever plaintiff might also try to concoct a common law claim for restitution of alleged ill-gotten gains, *e.g.*, all profits earned by a business with a wrongly obtained license or permit.

Given the expansive definition of a "claim" in the False Claims Act, a falsified application for a standard business license from the United States could – if that unissued standard business license constitutes government property – give rise to False Claims Act liability. Moreover, under the *qui tam* provision in the False Claims Act, "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1) (1994). Such private party suits are made attractive by the False Claims Act's bounty provisions, according to which the private party who initiates the suit receives anywhere from 10% to 30% of the proceeds of the action, as well as expenses, fees, and costs. 31 U.S.C. § 3730(d) (1994). Federal and state *qui tam* statutes, no less so than federal and state RICO statutes, would no doubt become powerful weapons of civil liability should unissued standard business licenses come to be viewed as the issuing authority's property.

The point is that Congress surely did not intend to launch the mail fraud, wire fraud, RICO, and *qui tam* statutes as weapons to be used in disputes about the issuance of standard business licenses. Nor is it any answer to say that only those who deliberately falsify license applications need fear such an expansion of liability. Even honest parties who apply for standard business licenses will be faced with, at a minimum, the costs of defending nuisance suits brought by private plaintiffs clever enough to frame RICO and *qui tam* complaints that, although meritless, can withstand a motion to dismiss and serve as a basis for burdensome discovery. The fact that the Government's treating unissued business licenses as government property for purposes of the federal mail

fraud statute entails exposing licensees to massive RICO and *qui tam* lawsuits demonstrates the absurdity of such a construction of the mail fraud statute.

CONCLUSION

For the foregoing reasons, in deciding this case the Court should make clear that an unissued standard business license does not constitute government property for purposes of the federal mail fraud statute, or expressly refrain from addressing that question.

Respectfully submitted,

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